June 29, 2007

Dr. Carol O'Neill Mayhew
Education Associate, Regulation Review
Department of Education
401 Federal Street, Suite 2
Dover, DE 19901

RE: 10 DE Reg. 1761 [Special Education Eligibility Regulations]

Dear Dr. Mayhew:

The State Council for Persons with Disabilities (SCPD) has reviewed the Department of Education's (DOE) proposal to amend Regulation 925 published as 10 DE Reg. 1761 in the June 1, 2007 issue of the Register of Regulations. As background, the DOE recently adopted Regulation 925 which comprehensively addressed IDEA evaluation, eligibility, and IEP standards [10 DE Reg. 1816 (June 1, 2007)]. The GACEC had submitted 9 pages of comments on the pre-publication version of the regulations through a February 28 memo. The DOE reserved publication of some standards pending further review and is now issuing proposed regulations covering eligibility of students with learning disabilities and visual impairments. Council has the following observations.

First, districts will be allowed to "phase in" the new evaluation standards and currently-eligible students will not be automatically reassessed outside the normal 3 year schedule. See Sections 6.4 and 3.0. SCPD endorses this provision.

Second, Council understands that the GACEC previously characterized the visual impairment eligibility standards as too restrictive. Its February 28 memo recited as follows:

> In Section 300.306C(1), we question whether the criteria for visual impairment based on lack of acuity are unduly prescriptive and constrictive. Literally, a student with only one eye whose remaining eye is corrected to 20/65 would be categorically excluded from qualifying under the visual impairment category. Such a student would have limited depth perception and acuity. The federal regulation [§300.8(b)(13)] is ostensibly less onerous: "Visual impairment including blindness means an impairment in vision that, even with correction, adversely affects a child's educational performance."

Although the DOE has now included degenerative diseases which are expected to reduce vision in the future (Section 6.17.2), the overall standard is still manifestly stricter than the federal criteria, i.e. an impairment in vision that, even with correction, adversely affects a child's educational performance". At a minimum, SCPD recommends inserting ", condition, or

impairment" after the word "disease" in Section 6.17.2. If a child experiences damage to the eye through trauma, which "seriously affects visual function directly, not perceptually", the child remains ineligible under the visual impairment category. The medical or physical etiology of the impairment should not be dispositive of eligibility.

Third, the "partially sighted" standard in Section 6.17.3 is stricter than that in Section 6.17.2. The latter section authorizes eligibility if there is "a disease of the eye or visual system that seriously affects visual function directly, not perceptually." This concept is absent from Section 6.17.3. Since Section 6.17.3 is already somewhat convoluted, and omits consideration of non-disease visual impairments, SCPD recommends substituting the following new Section 6.17.3:

> A licensed opthalmologist or optometrist shall document that a child meets the eligibility criteria of Sections 6.17.1 or 6.17.2.

This is simpler and achieves consistency among the regulations.

Fourth, Section 7.2 discourages intelligence testing as part of an LD eligibility assessment. Such testing is essentially only authorized in 2 contexts: 1) to differentiate students with mental retardation; and 2) to identify remedial interventions. This undermines Section 9.1.3 which contemplates consideration of patterns of strengths and weaknesses in assessments of intellectual development (e.g. scatter on I.Q. subtests). The federal regulation [34 C.F.R. §300.309(a)(2)(ii)] specifically contemplates assessment of "intellectual development". Moreover, as the GACEC noted in its February memo, if a team does not know how "smart" a student is, how can it assess whether performance is depressed?

Fifth, in a related context, Section 8.1.4 makes a school psychologist optional in the context of LD assessment. The GACEC addressed this approach in its February 28 memo. Although this approach meets the minimum federal standard (34 C.F.R. §300.308), the better practice would be to require the involvement of a school psychologist to enhance the validity and reliability of the assessment.

Sixth, Section 9.1 focuses exclusively on an assessment of whether a student meets age and grade level standards. This is unduly constrictive. The GACEC's February 28 comment in this context remains apt:

> The committee recognizes that §300.309 borrows standards from federal §300.311(a)(5) establishing age and grade-level points of reference. Although such reference points may be useful, they should not be <u>exclusive</u>. "High I.Q." students who would be performing much better than "age" or "grade-level" expectations <u>but for</u> a clinical learning disability should still be candidates for LD classification. Students may be eligible "even though they are advancing from grade to grade" [federal §300.111(c )(1)]. <u>See also</u> OSEP Policy Letter to P. Lillie, 23 IDELR 714, 717 (April 5, 1995) [student's underachievement is measured against a student's potential] and OSEP Policy Letter from J. Schrag to S. Ullisi, 19 IDELR 633 (January 14, 1992) [In noting that high IQ students may qualify as LD, OSEP commented - "It is OSEP's position that each child who is evaluated for suspected learning disability must be measured against his or her own expected performance, and not against some arbitrary general standard."]. <u>Cf. Conrad Weiser Area School District v. Thomas and Wendy L</u>, 603 A.2d 701 (Pa. Cmwlth. 1992) [gifted student determined LD despite district's argument that child did not "need" special education]. At a minimum, it would be preferable to amend §300.309(a)(1) and §300.311(a)(5)(i ) to read "...child does not achieve adequately for

> the child's intelligence or age or meet State-approved grade-level standards...". Section 300.309(a)(2)(i) could likewise be amended to read "...progress commensurate with intelligence or does not meet age or State-approved grade-level standards...".

Consistent with the commentary, it would be preferable to amend Section 9.1.1 to read "...child does not achieve adequately for the child's intelligence or age or meet State-approved grade level standards...". Section 9.1.2 could likewise be amended to read "...progress commensurate with intelligence or does not meet age or State-approved grade-level standards...".

Seventh, Section 12.0 establishes a rather convoluted and tortured pre-referral intervention process which includes 24 school weeks (Section 12.8.5) prior to consideration of referral for a special education evaluation. In its February 28 memo, the GACEC commented as follows:

> In §300.301, the time period for an initial evaluation is too lengthy. Indeed, the overall regulatory scheme contemplates undue delay in the process between "Childfind" identification and development of an IEP. Proposed §300.312v authorizes an aggregate of 24 weeks (approximately 6 months) of pre-referral interventions. Parental consent would then be solicited and obtained (with no explicit timetable). Once consent is obtained, §300.301 allows up to 45 school days or 90 calendar days (whichever is less) to complete the initial assessment and convene the meeting to determine eligibility. Then, consistent with §300.323, another 30 days may pass before an initial IEP meeting is convened. An entire school year could easily elapse under this Kafkaesque scheme. The ad hoc committee strongly endorses a more expeditious system.

Although the regulatory numbering has changed, the above observation remains apt.

Eighth, in a related context, Section 12.11 allows a parent to initiate a request for special education evaluation and bypass the RTI process. The GACEC commented on the pre-publication version of this standard as follows:

> As discussed in Par. 4 above, §300.312 is part of an evaluation system which authorizes inordinate delay in special education assessment. Section 300.312(f) is particularly egregious. Consistent with the discussion in Par. 41 above, once a public agency suspects that a child may have a qualifying disability, it must provide notice to the parents of their right to initiate an IDEA evaluation. In contrast, §300.312(f) does not require affirmative notice to the parents and is based on the notion that parents will magically "know" that they can request an IDEA evaluation. Likewise, this section authorizes an exception to even such parental request by rerouting a child suspected of EMH or LD eligibility back to the pre-referral system. This is not consistent with the federal scheme which contemplates timely initial evaluation. If a child has Downs Syndrome and an IQ in the 50s, making that student endure a 24 school week intervention experience to rule out EMH is ludicrous.

Although the regulatory numbering has changed, the above observation remains valid. Essentially, a district which has reason to believe that a child may be a child with a disability should solicit parental consent and initiate a special education evaluation. See 34 C.F.R. §§300.111, 300.300-300.302.

Ninth, although not earmarked for amendment, SCPD notes that Section 6.5.4.1 categorically ends a student's special education eligibility upon the student's 21st birthday. The former AMSES (§4.1.7) was less strict:

> Children in special education who attain age 21 after August 31 may continue their placement until the end of the school year, including appropriate summer services through August 31.

Indeed, the current Section 6.5.4.1 literally requires an abrupt cessation of services on a student's birthday irrespective of when it occurs during a school year. The DOE may wish to consider whether the former approach remains "allowable" and "preferable".

Thank you for your consideration and please contact SCPD if you have any questions or comments regarding our observations on the proposed regulations.

Sincerely,

Daniese McMullin-Powell, Chairperson
State Council for Persons with Disabilities

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